Supreme Court, U.S.
FILED
AUG 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2) (3)

Nos. 89-168 & 89-204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

REXALL DRUG COMPANY,

Petitioner,

vs.

ELIZABETH TIGUE, *et al.*,

Respondents.

E.R. SQUIBB & SONS, INC.,

Petitioner,

vs.

MINDY HYMOWITZ and ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

(For Continuation of Caption See Reverse Side of Cover)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PAUL D. RHEINGOLD
RHEINGOLD & MCGOWAN, P.C.
Attorneys for Respondents
113 East 37th Street
New York, New York 10016
(212) 684-1880

23 pp

E.R. SQUIBB & SONS, INC.,

Petitioner,

vs.

ELIZABETH TIGUE, *et al.*,

Respondents.

E.R. SQUIBB & SONS, INC.,

Petitioner,

vs.

JANE DOLAN and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

QUESTIONS PRESENTED

1. Where trial has not yet been held and there has been no determination of liability, can a final judgment be presented for this Court to review under 28 U.S.C. 1257?

2. Where a woman cannot identify the maker of a product which injured her, are due process concepts violated when the responsibility of various makers is measured by the amount of risk each created to the group of users?

3. Is a state court pre-empted from determining if a drug supplier is negligent under common law standards merely because a federal agency allowed it to market the product several decades ago?

4. Does a state statute which revived previously barred claims against certain product manufacturers violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. The Record Below is Seriously Misstated	1
B. Plaintiff Mindy Hymowitz and Others	3
C. The Practical Consequences of the *Hymowitz* Decision and of its Affirmance or Reversal	5
REASONS FOR DENIAL OF THE WRIT	6
I. The Decision Below Lacks Finality	6
II. A Market Share Rule Does Not Violate The Fourteenth Amendment	7
A. New York's Solution To The Non-Identification Problem Is Not Irrational	7
B. No Federal Interest Compels Overriding A Matter Of Purely State Tort Law	10
C. No "Retroactive Legislation" Is Created Depriving Petitioners Of "Vested Rights"	11
D. No "Unrebuttable Presumption" Is Created, Nor Is There An Unconstituional Change Of The Burden Of Proof	12

Page

III. There Has Been No Pre-emption Violative Of The Supremacy Clause 13

IV. The New York Revival Act Violates Neither The Equal Protection Nor Due Process Clause 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases	Page
Abbot v. American Cyanamid Co., 844 F.2d 1108 (4th Cir. 1988)	14
Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 469 U.S. 833 (1984).	9, 10
Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982)	9, 12
Brown v. Superior Court, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988)	7, 9
Campbell v. Holt, 115 U.S. 620 (1885)	14
Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945)	14
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	13
Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied sub nom. E.R. Squibb & Sons, Inc. v. Collins*, 469 U.S. 826 (1984)	8, 10
Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1975)	11
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	6
Dunbar v. New York, 251 U.S. 516 (1920)	11
Ex parte Collet, 337 U.S. 55 (1949)	11
Flynt v. Ohio, 451 U.S. 619 (1981)	6

Cases	Page
G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982)	14
George v. Parke-Davis, 107 Wash. 2d 584, 733 P.2d 507 (1987)	7
Hall v. E.I. DuPont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972)	9
Hurley v. Lederle Laboratories, 851 F.2d 1536 (5th Cir. 1988)	14
In Re Complex DES Litigation, No. 830109 (Cal. Super. Ct.)	5, 8, 12
Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984)	8
Martinez v. California, 444 U.S. 277 (1980)	11
McCarty v. McCarty, 453 U.S. 210	13
McCormack v. Abbott Laboratories, 617 F. Supp. 1521 (D. Mass. 1985)	8, 9, 10
McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (D.S.D. 1983)	8
Minnick v. California Dept. of Corrections, 452 U.S. 105 (1981)	6
O'Dell v. Espinosa, 456 U.S. 430 (1982)	6
Robinson v. Neil, 409 U.S. 505 (1973)	11
Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980)	8, 9, 10, 12

Cases	Page
Smith v. Eli Lilly & Co., 173 Ill. App. 3d 1, 527 N.E.2d 333 (1988)	7, 8
Solem v. Stumes, 465 U.S. 638 (1984)	11
Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948)	9
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	11, 13
Vlandis v. Kline, 412 U.S. 441 (1973)	13
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982)	14
Constitutional and Statutory Provisions	
28 U.S.C. 1257	i
Revival Act of 1986, L. 1986 c. 682	4, 14, 15
Other Authorities	
Restatement (Second) of Torts, Section 433B	9
Restatement (Second) of Torts, Section 876	9

STATEMENT OF THE CASE

Petitioners have misstated the record below, both as to what the court held and as to the significance of the holdings, especially as to a claim that the decision by the Court of Appeals is radical or unique. Further, petitioners have made factual misstatements about the case and have made policy arguments to this Court irrelevant to any constitutional issue. Following the discussion of these points, the Statement of the Case describes the plaintiffs to this action and analyzes the potential consequences of the decision.

A. *The Record Below is Seriously Misstated*

Three incorrect statements are made by petitioners about the holdings below, creating a rather serious misimpression about that decision.

1. Both petitioners state that the court below was critical of its own decision by making the following statements about it:

- it will not "provide a reasonable link between liability and the risk created by the defendant" (Decision, Rexall Pet. Br. 12a)[1]

- it will "likely result in a disproportion between the liability of individual manufacturers and the actual injuries" (12a)

- "the chance that a particular producer caused the injury is often very remote." (6a)

If indeed the court below had made these statements about its own holding and the rationale therefor, these petitioners would have something significant to reprove. However, what the decision below so obviously does when one reads these quotes is to reject them. Perhaps in their outrage petitioners did not understand, but the quote from Decision 6a explains the

---

[1] All references to the Court of Appeals *Hymowitz* decision are to the Rexall Appendix, prefaced by "Decision."

rationale for another form of liability, alternative liability, and in the next sentence the court rejects it!

The two quotes from Decision 12a are set forth in the opinion as part of the rationale given by *other* courts, and the court clearly rejects them. Immediately after these the court begins: "Instead," and then proceeds to supply the acceptable reasons for the adoption of market share.[2] In Point II we demonstrate that this analysis is not constitutionally irrational or wholly arbitrary.

2. Both petitioners state that the court below imposed liability on them. (Rexall Pet. Br. 10; Squibb Pet. Br. 10-11.) It did no such thing; the decision has nothing to do with liability. It determined that, where a person cannot identify the DES which her mother took, she may sue the manufacturers collectively, each for its own share, on the rationale that each put out a fungible, unlabeled product, at a time so long ago (due to the latency of the injuries) that innocent victims could no longer be expected to determine who made the DES involved.

The issue reached the Court of Appeals on defendants' motion for summary judgment, which therefore necessitated the temporary assumption by the courts involved of the truth of the complaints that the defendants were liable under New York's product laws. There have been no findings of liability yet. The cases were remanded for trial on that issue, and also for proof of causation and damages in each individual case. The only matter which is established, therefore, is that if Rexall or Squibb is found liable, and it caused damages, it will have to pay pursuant to the share of the national market it had.

---

[2] "Instead, we choose to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large. Use of a national market is a fair method, we believe, of apportioning defendants' liabilities according to their total culpability in marketing DES for use during pregnancy. Under the circumstances, this is an equitable way to provide plaintiffs with the relief they deserve, while also rationally distributing the responsibility for plaintiffs' injuries among defendants." Decision 12a.

3. Only in New York, petitioners argue falsely, can a DES manufacturer be held liable even if it can show it could not have made the DES which caused the injury. (Rexall Pet. Br. 8-9, n.4; Squibb Pet. Br. 6-7) In fact, that is also the result of prior rulings by the Supreme Courts of Michigan and Washington, and some lower courts (see Part IIA below). Further, manufacturers may seek exculpation in New York (see Part IIA below).

A sizeable part of petitioners' briefs also presents as statements of facts matters which are either not correct or which are designed to raise sympathy for them on issues extraneous to their limited constitutional appeal, as follows:

1. DES was not known to be dangerous until 1971. (Rexall Pet. Br. 6; Squibb Pet. Br. 4) In fact, there was considerable literature about its risks during the time it was on the market in the 1950s and 1960s. (Plaintiff's brief in *Tigue v. E.R. Squibb & Sons, Inc.*, Court of Appeals, p.13.)

2. Plaintiffs have lost DES cases at trial, and in one case it took the jury "just two hours" to decide the case (Squibb Pet. Br. 7). (As this Court may imagine, plaintiffs have won cases.) Squibb then concludes from this "fact" that the defendants are not the wrongdoers that the Court of Appeals assumed them to be. The court below so assumed since it was dealing with motions on the pleadings, and, in any case, we are confident that the Supreme Court will not take a case such as this in order to correct a factual determination made by a lower court.

3. The proof of causation is weak (Squibb Pet. Br. 5).

4. The decision below inhibits drug companies from making much needed, life-saving drugs, citing, *inter alia*, the New York Times (Rexall Pet. Br. 15-16, n.8). (We believe that no comment is needed on these last points.)

B. *Plaintiff Mindy Hymowitz and Others*

Plaintiff Mindy Hymowitz, at age 24 in April 1979, developed a cancer of the cervix, technically known as clear cell

adenocarcinoma. Her cervix, uterus and most of her vagina were removed surgically as a treatment for this condition. During the surgery, a nerve was inadvertently severed, causing her a permanent loss of bladder control. Her physicians reported her case in the medical literature, attributing the cancer to her mother's ingestion of DES during her pregnancy. (Plaintiff's Brief in *Hymowitz v. Eli Lilly & Co.*, Court of Appeals, p.4.) Under New York law as it existed in 1979, Miss Hymowitz could not sue any DES manufacturers because the statute of limitations had expired. Thereafter the revival act of 1986, L. 1986 c. 682, permitted her to sue, which she promptly did. *Id.* at 3.

Miss Hymowitz and her counsel have investigated the facts surrounding her mother's use of DES. Although diligent efforts have been made, it has proved impossible to determine whose brand of DES her mother took. (Plaintiff's Brief in *Tigue v. E.R. Squibb & Sons, Inc.*, Court of Appeals, note p.14.) Her suit, therefore, is against seven of the major suppliers of DES at the time she was exposed *in utero*.[3]

The facts of Mindy Hymowitz's case are similar to hundreds of other women in the litigation at bar. The New York Court of Appeals had before it a record that showed that: (a) these women were almost all unable to identify the supplier of DES which injured them; (b) this inability arose due to no fault of their own; (c) a major part of their inability arose from the decision of the DES manufacturers to supply generic, unbranded and similar looking DES medication; and (d) another reason for inability to determine the supplier was that the injury which DES caused was insidious and took many years to put in an appearance, by which time, in the normal course of record disposal and loss of recollection, it was impossible to determine the supplier. Decision 4a-8a.[4]

---

[3] Since commencement of her lawsuit, plaintiff has entered Brooklyn Law School and has naturally shown great interest in the legal aspects of her case (Plaintiff's brief in Court of Appeals, p.4).

[4] Of course, if a plaintiff can identify the brand of DES her mother used, then she need not and may not rely on market share. Her suit is against the actual supplier – if she has sued it. Decision 4a.

C. *The Practical Consequences of the* Hymowitz *Decision, and of its Affirmance or Reversal*

A contrast between the decision by the majority below and the dissent is quite illuminating, we would suggest, as to what has happened to New York's 700-1000 women who are now before this Court, and in turn what might happen if *certiorari* were granted.

The New York women will not get a full recovery for their injuries under the majority's decision. While they are given, on the one hand, an opportunity to collect some money for their injuries (if proved) from all those manufacturers who contributed to their risk of injury, on the other hand they are deprived of making a full recovery. This is because: (a) it is impossible to sue 100% of the market of suppliers, since many are no longer in business, Decision 6a; and (b) the Court of Appeals rejected the application of New York's long standing joint and several liability law to this case, Decision 13a. The latter ruling insulated those defendants who must contribute from having to pay more than their absolute market share. As the market was calculated in one jurisdiction already, *In re Complex DES Litigation*, No. 830109 (Cal. Super. Ct.), cited in Plaintiff's brief in *Tigue*, p.24, many women receive less than 50% of their full damages once joint liability is extinguished.

The dissenting opinion, which is praised by these two petitioners for accepting the concepts of exculpation, would have nonetheless retained New York's joint tortfeasor rule, Decision 18a, thereby ensuring that each woman would receive 100% of her damages — although presumably from a lesser pool of defendants.

Thus, each opinion reflects a balancing between concerns for the defendants and concerns for the plaintiffs. For some reason the two petitioners are unhappy with the balancing act which the majority performed, whereas it is fair to construe the non-participation by the many other defendants below as indicating that they would rather live with this balancing than with what would probably happen if this Court were to reverse the

majority's ruling. For, if the Court of Appeals on remand were to adopt the dissenting view, or some other solution [illegible]g proposed to deal with what all the judges recognized was the intolerable non-identification problem, then our plaintiffs might well receive full compensation.

REASONS FOR DENIAL OF THE WRIT

I. *The Decision Below Lacks Finality*

The decision below does not finally determine the constitutional rights of the petitioners in a way which precludes further review nor which threatens irremediable harm to them at present. First, the decision below arose on an interlocutory appeal from the denial by a trial-level court of a summary judgment motion by DES manufacturers. Contrary to the statement in Rexall's brief (Pet. Br. 3), there has been no trial. Rexall has not been held liable to pay any money, either by a trial court or an appellate court. As observed in the Statement of the Case, Rexall may well be found not to be liable if and when a liability trial under New York product law is held. Or it may be found in any individual case not to have caused the injury, or perhaps it will claim that it did not promote DES for pregnancy usage, or it may end up with a jury finding of no share of the market.

Any claims of unconstitutionality which petitioners have are preserved for later review, should they hereafter be held liable and to have to respond in damages. *Flynt v. Ohio*, 451 U.S. 619 (1981) at 621: review "can await final judgment without any adverse effect upon important federal interests." There would be a distinct benefit to this Court to have the results of further proceedings, including a trial, in order to evaluate any alleged constitutional infirmities. Only then would an adequate factual record exist. *See Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981); *O'Dell v. Espinosa*, 456 U.S. 430 (1982). Further, the various exceptions set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), are not applicable.[5]

---

[5] Other courts adopting market share or similar means of avoiding the need for identification have recognized that in so doing they were leaving it to

(Footnote continued)

II. *A Market Share Rule Does Not Violate The Fourteenth Amendment*

A. *New York's Solution To The Non-Identification Problem Is Not Irrational*

The decision by the Court of Appeals to adopt a market share rule, to deal with the problem of the inability of women to determine the brand of DES their mothers used, was a rational, common law response which has substantial antecedents. Or at least, given the application of the rational analysis test to the action of the state court (petitioners do not claim any other test should be used), the action taken was not irrational nor wholly arbitrary. (The holding of the court is quoted at footnote 2.) It should also be noted that the numerous constitutional issues raised in these petitions were not discussed in any of the appellate decisions.

The petitioners' due process challenge based upon irrationality proceeds on two roads. The first is to miscite from the decision below; the second is to suggest that the decision jumps radically beyond common law of New York or "good" general jurisprudence. As for misstating the record, we review in Section A of the Statement of the Case the errors made by petitioners in quoting from the decision below: the Court of Appeals did not label its rationale for the use of its form of market share as lacking a "reasonable link" or that the chances were "remote" that a defendant who was held to pay made the drug in question. It expressly *rejected* these and similar rationalizations.

Understandably, since petitioners want to attack the reasonability of the decision below, they studiously ignore the rationale for the decision given by the court to utilize a national market share for the some 700-1000 women now involved in the New York DES litigation: each manufacturer created a risk when it put a dangerous product on the market, and that a fair way

---

the lower courts by subsequent proceeding to develop details of the concept. *See e.g., Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 527 N.E.2d 333 (1988) at p. 346. In states which have had market share for some time the highest courts have re-reviewed their decisions in further appeals, *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988); *George v. Parke-Davis*, 107 Wash. 2d 584, 733 P.2d 507 (1987).

to quantify the risk was by the amount of the product which it sold in comparison to the total sold. (Decision 12a)

In the California DES litigation cited by the Court of Appeals (*In re Complex DES Litigation, supra*), for example, petitioner Rexall was found to have had between .5 and .9 percent of the DES market for various years at various strengths of the medication (that is, less than 1%). If we assume that ultimately 1000 New York women will have their damages assessed pursuant to a similar market share worked out here, Rexall will pay, say, .7 percent, more or less — or the equivalent of only 7 women! What the Court of Appeals decided, as a factual and legal matter therefore, is that this approximates, as best as legal ingenuity can, the probabilities that New York mothers did get their DES at Rexall drugstores (7 in 1000).

Rexall, Squibb, and every supplier of DES in the 1950s and 1960s is responsible for creating the risk of injury to all DES users. This rationale underlies every one of the decisions adopting market share: *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912, (1980); *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied sub nom. E.R. Squibb & Sons, Inc. v. Collins*, 469 U.S. 826 (1984); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984); *Smith, supra; McCormack v. Abbott Laboratories*, 617 F. Supp. 1521 (D. Mass. 1985); *McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265 (D.S.D. 1983).[6]

The collective liability which petitioners portray as so "radical" has long been embedded in the common law, with the market share solution below being nothing more than a variation of the theme of how the law will deal with a single injury caused by one of potentially multiple tortfeasors. (a) *Alternate*

---

[6] Most of the case citations given by both petitioners for propositions relating to the unfairness of market share are to those lower court cases which rejected market share or its equivalent in DES cases. Squibb Pet. Br. 13-15, Rexall Pet. Br. 8, n.4. At the most all this proves is that there are several schools of thought in the states in this developing field of product liability. Varying common law solutions to a problem do not create inherent constitutional conflicts, however.

liability: the two hunters situation, where the one who did not shoot the person is nonetheless liable, *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948); Restatement (Second) of Torts, Section 433B, applied to the DES situation in *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 469 U.S. 833 (1984); (b) *concert of action*: one car in a drag race hits the pedestrian, other racers are liable; Restatement (Second) of Torts, Section 876, applied to DES in *Abel, supra; Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982); and (c) *enterprise* or *industry-wide liability*: all makers of blasting caps are held liable although only one made the product which exploded, causing injury, *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972).

Further, and contrary to what petitioners tell this Court, the *Hymowitz* decision is not unique among DES cases in holding manufacturers liable even though they can prove in an individual case that they could not have made the DES which caused the injury.[7] In *Abel*, 343 N.W.2d at 174, the underlying tenet of the decision is that all defendants acted wrongfully in relation to each plaintiff. No manufacturer was to be exculpated. In *Brown*, 751 P.2d at 470, which reviewed the market share rule California had previously adopted in *Sindell*, 607 P.2d at 924, the court stated of the prior decision: "We realized that in order to provide relief to an injured DES daughter faced with this dilemma, we would have to allow recovery of damages against some defendants *which may not have manufactured the drug that caused the damage*. To protect such defendants against excessive liability, we considered and rejected three separate theories of liability suggested by the plaintiff, and formulated, instead, the market share concept." *Emphasis added*. And in *McCormack*, 617 F. Supp. at 1527, the district judge adopted market share because any disproportion "between potential liability and actual responsibility is significantly reduced." Continued that court as to its market share rule, "It is conceded that in some situations

[7] Nor is it accurate to state that the decision below does not permit DES manufacturers to exclude themselves from responsibility. If they did not market the drug for the uses for which plaintiffs' mothers took them, they are excluded. Decision 13a.

a defendant will be held liable to a particular plaintiff whose injury it did not actually cause." (*Id.*)[8]

B. *No Federal Interest Compels Overriding A Matter Of Purely State Tort Law*

This Court has consistently rejected petitions for writs of certiorari in DES cases involving market share and related issue. *Sindell, supra; Collins, supra; Abel, supra.* Nor, to our knowledge has this Court reviewed any cases in the tort field relating to the use of similar doctrines in any product situation.

"[T]he State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action

---

[8] We would like to deal briefly with four of petitioners' favorite epithets: "unlimited victim compensation," "wrongdoer," "practical," and "badge of infamy." As far as the challenge that the decision below creates a "system of virtually unlimited victim compensation" which petitioner Squibb excitedly accuses New York of doing (Squibb Pet. Br. 20), in fact it has created a system where no woman will get full compensation and most will receive less than 50% of their damages, because the great majority of the manufacturers whose market shares must be counted toward the total have not and could not be sued. *See* Statement of the Case, Section C.

As for use of the "wrongdoer" language (Squibb Pet. Br. 7), as we have pointed out in the Statement of Case, Section A, this is an assumption made by the court on a summary judgment motion. However, for these defendants now to portray themselves as innocent (Rexall Pet. Br. 18), is equally inapposite. Nonetheless, it is pleaded that they were careless, and the highest courts of California, Michigan, Washington and Wisconsin, as cited above, have all indulged in the assumption that these companies were wrongdoers.

Another word used by Chief Justice Wachtler in the decision below also throws petitioners into a huff: "practical" – that market share is being adopted for "essentially practical reasons." (Decision 12a) Somehow the implication petitioners want to draw from this is that the decision must be wrong because it is founded, in part, on practical reasons. Of course, they can support their feelings with citations to no cases from this Court or lower ones, because there is no gulf between the jurisprudential and the practical. Nor do we perceive that the imposition of responsibility in the present case represents a "badge of infamy." Rexall Pet. Br. 15.

that is wholly arbitrary or irrational," *Martinez v. California*, 444 U.S. 277 at 282 (1980).

A common law determination by a state court in the field of product liability about how to deal with the burden of proof and the identification of tortfeasors is a paradigm of a state's interest in fashioning its own tort law. And while petitioners strive mightily, what is the wholly arbitrary invasion of a federal interest petitioners assert?

C. *No "Retroactive Legislation" Is Created Depriving Petitioners Of "Vested Rights"*

Another due process challenge petitioners assert is that potentially holding them responsible under the New York decision violates a ban on retroactive legislation. First, however, this is not legislation; it is a common law decision. Second: "As a rule, judicial decisions apply 'retroactively.' *Robinson v. Neil*, 409 U.S. 505, 507-508 (1973). Indeed, a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984). Therefore, one cannot generally have a "vested right" in a common law decision, nor do petitioners cite a case to the contrary. Two general aphorisms are also perhaps applicable: no one has a vested right in any given mode of procedure, *Ex parte Collet*, 337 U.S. 55 (1949); no constitutional right can be based on the error of a prior court decision, *Dunbar v. New York*, 251 U.S. 516 (1920).

Even retroactively spreading liability by statute is not necessarily violative of the Constitution. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Court upheld a scheme which spread the costs of lung disease back to coal mine operators who had been former employers, forming somewhat of an analogy to the spreading of the costs of injury in the present case. This Court stated, "It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader costspreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." (428 U.S. at 19). *See also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1975).

Equally conclusive on the issue of retroactivity and property rights is that the *Hymowitz* decision in fact did not change the law of New York. The decision was fashioned to solve a new fact problem by applying existing New York precedents to it. Further, the concept of market share in DES cases had been around a decade, (*Sindell*, *supra*, and petitioners, among others, had participated in the California proceedings (*In re Complex DES Litigation*, *supra*)). Therefore, surprise cannot be claimed.[9]

D. *No "Unrebuttable Presumption" Is Created, Nor Is There An Unconstitutional Change Of The Burden Of Proof*

It takes some degree of torture to turn the decision below, holding all manufacturers potentially responsible, into the creation of an "unrebuttable presumption."[10] Nor, according to recent decisions of this Court, would such a presumption be a per se violation of the constitution.

What the court below held was that all sued manufacturers (unless exculpated for various reasons) created a risk to the offspring of all women who used the drug. It did not hold that Squibb or Rexall made the drug which injured Miss Hymowitz or other plaintiffs, only that whether it made that drug or not it participated in the creation of a risk for which it is therefore responsible, but only for the proper percentage of the risk it created.

Using the rational analysis test (as would be used in this case, see introduction to Point IIA above), this Court allowed as a

---

[9] Further, the doctrine of collective liability traces back to decisions decades ago, see Point IIA above. In the form of concert of action it had already been applied to DES manufacturers in New York in 1982, *Bichler*, *supra*, from which no *certiorari* was sought.

[10] This issue was not raised in the trial or intermediate appellate court, but only for the first time in the Court of Appeals. Like all others it was not ruled on by the Court of Appeals.

reasonable classification an "irrebuttable presumption" that disability of coal miners was due to black lung disease. *Usery, supra.* The *Vlandis v. Kline*, 412 U.S. 441 (1973), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), cases cited by petitioners represent analyses made under strict scrutiny analysis. Petitioner Squibb's arguments about burden of proof (Pet. Br. 15) rely upon cases dealing with causation. In the litigation yet to be held in New York, plaintiffs individually will have to prove that their exposure to DES caused their injuries – to the degree of proof (preponderance) already required under New York law. Nothing in the decisions by this Court cited by petitioner relates, even indirectly, to the identification issue in the case at bar.

III. *There Has Been No Pre-emption Violative Of The Supremacy Clause*

Petitioner Rexall would override New York's law relating to the identification of DES tortfeasors by the Supremacy Clause. This is an argument it alone among defendants in this litigation has urged, and one which the appellate courts have not discussed. Even if one conceded, for the moment, that there are pre-emption issues in this case and that this Court might someday step into the field as it relates to product liability, this would hardly be the case since there is little record and no reflection by judges below on the issue.

This Court stated in a similar situation: "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *McCarty v. McCarty*, 453 U.S. 210, 220.

The determination by a state court to use a market share approach to an identification problem hardly could, in any case, be pre-empted by the mere fact that at some time decades ago a federal agency permitted a product to be sold. This is not a case where liability is being imposed for the mere sale of a product (indeed, it is not even a liability decision, as observed above). This is a case where it is alleged that the defendants

marketed the product without doing the testing and warning which New York's common law required of them at the time of sale. *Hymowitz* Verified Complaint R 00029.[11]

IV. *The New York Revival Act Violates Neither The Equal Protection Nor Due Process Clause*

Petitioner Squibb (but not Rexall) argues that the revival statute, by which plaintiff Hymowitz and other victims presently maintain their suit, is violative of the Due Process Clause by allowing the revival of what had been barred causes of action. The Court of Appeals (Decision 15a), and the trial court in a separate opinion, (Rexall Pet. Br. 38a), had no problem rejecting this argument, finding in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), a clear and simple power for the legislature to amend the statute of limitations to allow for revival of old claims, as nothing more than procedural adjustment. One does not have a "vested right," the case holds, in the continuation of a statute of limitations.

Contrary to the spurious argument that this Court has somehow walked away from the holding in *Chase* (itself built upon a 1885 decision, *Campbell v. Holt*, 115 U.S. 620), the Court has in fact repeatedly regarded statutes of limitations as procedural creations of the state, relying on *Chase*. *See, e.g., G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

Finally, in the waning paragraphs of its petition, Squibb revives a second argument for unconstitutionality in the revival law: lack of equal protection. Here again the Court of Appeals (Decision 16a), not to mention the trial court (Rexall Pet. Br.

---

[11] While cases in lower courts go in various directions on the pre-emption issue with a great variety of products, there is a solid line of pharmaceutical cases which have denied the use of the doctrine to block suits based upon violation of common law negligence duties. *Hurley v. Lederle Laboratories*, 851 F.2d 1536 (5th Cir. 1988); *Abbot v. American Cyanamid Co.*, 844 F.2d 1108 (4th Cir. 1988).

38a), made short work of the claim, by pointing to substantial evidence in the record that there was special information and need to act in reviving barred DES claims compared to the whole world of toxic tort claims. As observed by all, if a pressing need arises to revive the cause of action for other products, the state legislature will do it then. This is a matter peculiarly within the police power of a state.[12]

CONCLUSION

This Court should deny the petition for certiorari for the reasons stated.

Dated: New York, New York
August 25, 1989

PAUL D. RHEINGOLD
RHEINGOLD & MCGOWAN, P.C.
Attorneys for Respondent
113 East 37 Street
New York, New York 10016

[12] If this Court were to declare the revival law unconstitutional it would, as we pointed out to the New York courts below, also be throwing out the thousands of suits involving asbestos and other products also brought under that act. Further, a package of companion tort reform legislation, all passed in one bill with no severability clause, would also die. See Plaintiff's Brief in *Hymowitz*, Court of Appeals, p. 74; L. 1986 c. 682.